



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 8, 1996

Ms. Nora A. Linares  
Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

OR96-1081

Dear Ms. Linares:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39975.

The Texas Lottery Commission (the "commission") received a request for information concerning the adoption or proposal of certain commission rules relating to the regulation and administration of the Bingo Enabling Act. You contend that the requested information is excepted from required public disclosure pursuant to sections 552.103, 552.107(1), and 552.110 of the Government Code. We have considered the exceptions you raise and have reviewed a representative sample of the documents at issue.<sup>1</sup>

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.<sup>2</sup> Thus,

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>2</sup>Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to

under section 552.103(a), a governmental body's burden is two-pronged: the governmental body must establish (1) that litigation is either pending or reasonably anticipated and (2) that the requested information relates to that litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 (1990) at 4.

Section 552.103(a) was intended to prevent the use of the Open Records Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 (1989) at 4. The Open Records Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. *See* Attorney General Opinion JM-1048 (1989) at 3 ("the fundamental purposes of the Open Records Act and of civil discovery provisions differ"). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 (1990) at 3.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example: the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party, *see* Open Records Decision No. 555 (1990); a potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); or the potential opposing party threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You assert that litigation is reasonably anticipated because several attorneys, including the requestor, have publicly threatened to file a lawsuit over the newly adopted rules. You have provided this office with two affidavits and a copy of a newspaper article supporting these assertions. In this instance, we believe that you have made the requisite showing that litigation is reasonably anticipated. Having reviewed the documents at issue, we conclude that they are related to the reasonably anticipated litigation and, consequently, you may withhold the requested information pursuant to section 552.103(a) of the Government Code.

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(Footnote continued)

which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

In reaching this conclusion, however, we assume that the opposing parties to the anticipated litigation have not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>3</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/rho

Ref.: ID# 40024

Enclosures: Submitted documents

cc: Mr. Lowell Lasley  
823 Congress, Suite 915  
Austin, Texas 78701  
(w/o enclosures)

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<sup>3</sup>Because we conclude that section 552.103(a) resolves this request, we need not now consider the other claimed exceptions to required public disclosure. We caution the commission, however, that the records submitted for our review may contain proprietary information that may be protected from disclosure under section 552.110 of the Government Code. If the commission receives requests for these records when section 552.103(a) is no longer applicable, the commission may submit another request for an open records ruling based upon other exceptions that may be applicable at that time. In any event, we urge the commission to exercise caution before releasing any proprietary information. *See* Gov't Code § 552.352 (providing penalties for improper release of confidential information).